Frequently Asked Questions

1. Have jurors made up their minds by the end of the opening statement?

It is an overstatement to assert that "most jurors have made up their minds by the end of opening statement." Jurors have not necessarily reached a firm conclusion regarding their verdict by the end of opening statement. However, something very important has happened by this point in the trial that strongly influences all subsequent incoming evidence.

Researchers have consistently found, both from systematic evaluations and from observational data of jury deliberations, that jurors reach tentative conclusions very early in the trial. These tentative conclusions are often highly correlated with individual verdicts taken just prior to group deliberations. Social psychologists refer to these *tentative conclusions* as "conceptual frameworks." It appears that jurors, early in the case, adopt a point of view (or a frame of reference) for subsequent information. This frame-of-reference becomes a filter for information, resulting in new facts being adopted or rejected, depending upon how consistent the information is with their frame of reference. Essentially, jurors develop selective perception of incoming information. They accept and attend to those things which fit with their initial orientation and "forget" or fail to hear inconsistent information. Researchers have found that jurors can describe their conceptual framework early in the case, frequently after voir dire is completed.

Developing a frame of reference for filtering incoming information is a natural, adaptive human information processing tool. People do not attend equally to every bit of information that is presented to them. We would be overwhelmed with isolated bits of information if we did. Rather, perceptions are organized, either based upon previous experiences, beliefs and attitudes, or upon conceptual schemes that are presented to us. That's why public speakers are advised to

"tell them what you're going to tell them; tell them; then tell them what you told them". People organize and retain information through frameworks.

Clearly, the fact that jurors must develop some type of organizational reference for incoming information underscores the importance of providing jurors with a frame of reference favorable to the litigant's position. Counsel must identify *central themes* which can be used by the jurors as reference points for organizing incoming information. We have found repeatedly in observing the jury deliberations through one-way mirrors that jurors often become "advocates" for one side or another. The most effective juror advocates are those who can call up cogent summaries or "refrains" from the case. When representing a corporate defendant in a multi-million dollar personal injury suit stemming from an accident involving a corporate owned vehicle, the defense asserted they were a "scapegoat," and that the true driver at fault in the accident the drunk driver. The refrain was repeatedly used from opening statement to closing argument. In post-trial interviews we learned that pro-defense jurors repeatedly asserted this 'scapegoat' refrain during deliberations. The actual jury returned a defense verdict for the client.

Essentially, research suggests that not every juror has closed his/her mind toby the conclusion of opening statements, but most jurors have adopted some type of conceptual framework which serves as an organizing vehicle for incoming information. Information that is consistent with this framework is apparently attended to. In fact, we often find that this information is contained in jurors' notes. Information that is inconsistent with this framework is often disregarded or simply "not heard". Many jurors, in post-trial interviews, will earnestly assert that evidence supporting positions opposed their viewpoints never came up at trial. It is clear that they simply did not "hear" the evidence or subconsciously disregarded it.

2. What do jurors look for in assessing the credibility of a witness?

It is well established in the literature on persuasive communication that jurors attend to more than simply what is said in determining the credibility of a witness or an attorney. *Verbal and non-verbal behaviors are taken into account in formulating assessments of the credibility of others*.

There are a number of important variables that factor into a person's assessment of the credibility of a speaker and it is important not to lose sight of these issues, even though jurors have great difficulty articulating the factors that influence their assessments of witnesses and lawyers. We know from systematic research separating the content of presentations from the presenter that, in fact, both verbal and non-verbal behaviors are powerful influences on the cumulative effectiveness of the witness or lawyer.

There are no clear-cut generalities to say that jurors weigh content and non-verbal presentation factors equally across all witnesses. Rather, verbal and non-verbal behaviors are contribute to three broader components of persuasiveness that we have observed after years of systematic research. The elements of persuasiveness can be clustered into three factors; trustworthiness, competence and likability. *Competence* measures whether the speaker has demonstrated knowledge and understanding of the issues at hand and is qualified to be speaking on the subject. This is true of expert witnesses, lay witnesses and the attorney. Next, are measures of *trustworthiness* which involve jurors' subjective impressions that the witness is credible. And finally, issues related to *likability* have, in fact, been reliably demonstrated to influence the overall effectiveness of a witness or an attorney. Research in social psychology has revealed that people tend to attribute many positive characteristics to others whom they like, including rating them as more credible, successful, attractive, interesting and effective.

Thus, evaluating a witness or assessing the effectiveness of an attorney breaks down into

verbal and non-verbal evaluations of three important dimensions: *credibility, trustworthiness and likability*. Clearly, the more favorably a witness or an attorney is evaluated on each of the dimensions, the more effective he/she will be in commanding the attention of jurors and persuading them of the merits of his/her position. It is true that one cannot divorce content from the presenter and all too often a disproportionate share of attention is spent on preparing the content of the case without focusing on the style and competence of the presenter.

3. What about making objections? Do jurors view the attorney unfavorably?

Two factors must be weighed in terms of making *evidentiary objections*. For some cases "protecting the record" for appeal may be of paramount importance and thus, issues relating to the impact of objections on the jury are secondary. In either case, counsel should be aware that jurors make a number of interpretations about objections by counsel.

Research has shown that testimony that is objected to becomes essentially "highlighted" and jurors recall testimony following objections (and most other courtroom interruptions for that matter) with greater frequency than would otherwise be expected. Essentially, the greatest effect of objections is to draw attention to the issue at hand. A ruling by the judge to disregard the testimony, only further underscores the testimony. Thus, one of the paramount considerations regarding objections is whether or not one wishes to draw attention to the testimony at hand.

The secondary consideration is jurors' impressions of counsel. There are no global rules of thumb that apply to every case. In some instances we have seen repeated objections by counsel work very favorably, as it gives the impression that the other side is attempting to circumvent 'the rules.' The attorney making the objections is seen as alert and conscientious. To the other extreme, we have seen repeated objections by counsel received as annoying, disruptive and a sign of weakness. There is a weak correlation between favorable and

unfavorable impressions and whether the objections were sustained or overruled, but for the most part, jurors do rely on the ratio between sustained and overruled objections in forming their impressions, but rather on their own subjective determinations of 'appropriateness' of the objections.

This leaves counsel with a difficult balancing act of deciding when to make an objection. Clearly, counsel should weigh the importance of an objection and not merely make objections just because something is objectionable.

4. Should witness preparation be kept to a minimum so that a witness does not appear to have rehearsed his/her testimony?

Poorly prepared witnesses are the greatest weakness in any case. Attorneys often fear that a witness will 'look rehearsed' and therefore they will raise suspicions in the jurors' minds. Thus attorneys often engage in only cursory preparation of a witness. Rarely have we seen a witness who was 'too smooth' due to witness preparation. Given that it occasionally might happen, this rare event must be weighed against the overriding consideration that a poorly prepared witness is generally ineffective, and, in fact, can irritate the jury. Over and over again we hear jurors comment negatively on the credibility and effectiveness of witnesses who are poorly prepared, nervous, or do not 'cooperate' effectively during their own direct examination. To the other extreme, it is rare to hear jurors complain about a witness who was relaxed and prepared for hi/her direct examination. In fact, we have heard many jurors express irritation toward an attorney whose witness was confused and unable to communicate effectively. In essence, the jurors report that they <u>fully</u> <u>expect</u> an attorney to have met with a witness and discussed the pending testimony. Failure to do so, is often seen by jurors as an indication that the attorney's lack of interest in the testimony of the witness. Jurors fully expect that an attorney has prepared his or her own witness. **They are far more likely to comment on the negative**

aspects of a poorly prepared witness than to negatively comment on a well-prepared witness.

One important error often made in witness preparation is failing to conduct specific preparation of testimony. Often, attorneys will meet with a witness in the attorney's office and discuss in global terms the nature of the direct examination, describing the topics the attorney intends to cover. Rarely is the witness given a 'dry run' and allowed to formulate answers to the attorney's questions. Rather, an abstract discussion usually takes place with no specific rehearsal is involved.

Much can be learned both by the attorney and by the witness if the witness is allowed to attempt to formulate answers through a dry-run. It is easy to spot a poor choice of words, or an answer that is too expansive or otherwise inadequate. These issues can be ferreted out in the attorney's presence and worked through, rather than allowing a witness to stumble on the witness stand. A witness confused by his own attorney's questions is often mistaken as searching for cues to the right answer, an impression counsel certainly does not want a witness to make.

Beyond merely attempting a walk-through of the direct examination in the informal atmosphere of the attorney's office, it is highly advisable to attempt to evoke some anxiety in the witness during the dry run. They will be nervous in court. Approximating their emotional state creates a better rehearsal, what psychologists refer to as a transfer of learning across different settings. For example, rather than undertaking the mock direct examination one-on-one in the attorney's office, it might be better to move the witness into a conference room, have them sit some distance from the attorney, and have one or two office staff available to sit in on the mock direct examination. The distractions created by the presence of other individuals will heighten the witness' anxiety and thus, a clear simulation of what the witness is likely to do in the

courtroom can be created. It is very helpful to the attorney and the witness, if the witness is given an opportunity to confront the task of testifying while somewhat nervous and distracted.

In sum, poorly prepared witnesses draw negative attention to themselves. Well prepared witnesses create little distraction and their testimony is rarely criticized for appearing ‘too rehearsed.